UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED: April 22, 2009

CBCA 1073

OCWEN LOAN SERVICING, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Gregory S. Jacobs, James P. Gallatin, Jr., and Lawrence S. Sher of Reed Smith LLP, Washington, DC, counsel for Appellant.

Dennis Foley, William Korth, Phil Kauffman, and Phillipa L. Anderson, Office of General Counsel, Department of Veterans Affairs, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **HYATT**, and **DRUMMOND**.

DANIELS, Board Judge.

Once again, the Board has thrown the respondent in this case, the Department of Veterans Affairs (VA), a lifeline, and the agency has used that rope to hang itself. The appeal is granted because, in response to the Board's request for a definition and explanation of the portion of the government claim which survives, VA has provided no definition or explanation whatsoever.

Background

The contract at issue here is for the performance of services involving the sale of real estate which comes into VA's possession through foreclosures on VA-guaranteed loans. The claim is for penalties which the contract specifies are to be calculated with reference to Return on Sale (ROS). A key component of ROS is the foreclosure appraisal values used by VA for the properties in question. VA refused to produce foreclosure appraisals for the vast majority of the properties -- first in response to discovery requests made by the contractor, Ocwen Loan Servicing, LLC (Ocwen), and later in response to an order by the Board. In an earlier decision, the Board concluded that without the appraisals, the agency could not demonstrate that the penalties were reasonably premised as to these properties. We consequently granted the appeal as to that portion of the claim involving the properties.

We allowed the case to proceed as to the properties for which VA *had* produced foreclosure appraisals. In doing so, however, we stated:

> We are not certain . . . whether the agency can, without reference to the great bulk of appraisals, establish that any penalties may fairly be imposed on the contractor. The contract requires that an ROS be based on all properties sold during a particular period, and it is not clear whether, by eliminating properties from the universe from which an ROS might be calculated, it is possible to calculate an ROS. We therefore hold in abeyance a ruling on the remainder of Ocwen's motion [to grant the appeal]. VA is directed to provide to the Board and the contractor, within two weeks from the date of this decision -- by Thursday, April 2, 2009 [--] a proffer of the portion of the claim (if any) it believes survives the decision. If the proffer is that some of the claim survives, the proffer shall include a detailed explanation of how that amount is calculated and a complete list of the evidence which may be relied upon to support the amount. After reviewing this proffer, and considering Ocwen's comments on it, we will rule on the part of the motion as to which we have now held in abeyance.

Ocwen Loan Servicing LLC v. Department of Veterans Affairs, CBCA 1073 (Mar. 19, 2009), slip op. at 12.

VA filed on April 2 a statement it called "Respondent's Proffer and Request to Set Aside Sanctions and Motion for Protective Order." Notwithstanding the title, as Ocwen points out, this statement is not the proffer that the Board directed the agency to file. The statement does not include a definition of the portion of the claim VA believes survives our March 19 decision. Indeed, it does not cite a single dollar figure. Nor does the statement

include a detailed explanation of how an amount is calculated. With the exception of a brief apology (for what is not made clear), the statement consists almost entirely of a request for reconsideration of the March 19 decision. The request argues that VA is "not obliged to retain or to provide pre-foreclosure appraisals" and that "Ocwen was contractually obliged to provide the . . . appraisals." Respondent's Proffer at 2, 3. Additionally, "Respondent protests it is being compelled to proffer its entire case for Board decision before any evidence is properly taken and before discovery is completed." *Id.* at 6.

Discussion

In issuing the interlocutory decision on March 19, the Board was uncertain whether any of the Government's claim survived our rejection of most of it. We sought assistance, in understanding the dimensions of the remainder of the case, from the party which had made the claim. Our order was a commonplace direction in litigation: an effort to determine, from the party bearing the burden of proof, how the claim was constructed and whether any support for it existed. In response, VA has declined to provide any information at all. Because the party making the claim has failed to establish a prima facie case for going forward, we have no alternative but to conclude that the penalties are without foundation. The appeal is therefore granted, to the extent that it remained open on March 19.

The request for reconsideration is not well taken. VA still does not seem to understand that foreclosure appraisals must be produced to demonstrate that penalties based in large part on them are reasonably premised. Thus, our decision was reached not because VA disobeyed discovery orders (which it did), but rather, because the agency failed to meet its obligation to demonstrate that it had sufficient basis to support its claim. Some of the arguments made in the motion were previously made and rejected, and others could have been made on the basis of documents in the record but were not. Neither variety of argument is appropriately put before us now. Board Rule 26(a) (48 CFR 6101.26(a) (2008)) ("Arguments already made and reinterpretations of old evidence are not sufficient grounds for granting reconsideration"); *Watson v. United States*, 281 F. App'x 970, 971 (Fed. Cir. 2008) ("a new legal argument cannot be raised in a motion for reconsideration under RCFC [Rules of the Court of Federal Claims] 59(a)(1) when the plaintiff knew of the facts giving rise to the argument during the pendency of the case"); *National Westminster Bank, PLC v. United States*, 512 F.3d 1347, 1352, 1363 (Fed. Cir. 2008) (argument made on reconsideration but not presented during briefing stage held to have been waived).

Ocwen has presented an elaborate explanation showing that no penalties can be justified under the contract with regard to the properties for which VA has produced foreclosure appraisals. Appellant's Comments Regarding Respondent's Proffer at 4-8 & Attachment A. Because the penalties are a Government claim and VA has made no effort,

in response to our March 19 order, to satisfy its burden of demonstrating that there is justification for them, we have no need to analyze whether Ocwen's explanation is valid. Similarly, because we have rejected VA's request for reconsideration, we do not analyze the agency's brand new -- and quite surprising, in light of the history of the case -- argument that Ocwen, not VA, was responsible for creating the foreclosure appraisals.

Decision

To the extent that this appeal was not resolved in the Board's decision of March 19, 2009, the appeal is now **GRANTED**. The appeal is consequently granted in its entirety. VA may not impose on Ocwen any of the penalties encompassed in the claim which is the subject of this case.

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STEPHEN M. DANIELS
Board Judge

We concur:

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CATHERINE B. HYATT
Board Judge

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JEROME M. DRUMMOND
Board Judge